IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

NO. 76 - 802

H. GORDON HOWARD, *Appellant*

vs.

THE REAL ESTATE COMMISSION OF THE STATE OF COLORADO, *Appellee*

ON AN APPEAL FROM THE THREE-JUDGE PANEL IN CIVIL ACTION NO. 75 M 297 OF THE UNTED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

MOTION TO DISMISS OR AFFIRM

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MOTION TO DISMISS OR AFFIRM

Appellee, Real Estate Commssion of the State of Colorado, moves the Court to dismiss the appeal herein or, in the alternative to affirm the judgment of the United States District Court for the District of Colorado upon the determination of a three judge court that the Appeallant herein had shown no basis for any claim of relief within the jurisdiction of the court. Appellee further states that it is manifest that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument.

STATEMENT OF THE CASE

Appellant Howard's entire claim revolves around the Real Estate Commission's application of the following statute, Colorado Revised Statutes 1973, 12-61-110 (4), (formerly C.R.S. 1963, 117-1-8 (1) (d) which states in relevant part:

> All licensees who fail to renew their licenses before February 1st of each year succeeding the year of their previous license, shall be required to file a new application and *may* be required to submit to and pass the examination required by this article for original applicants. (emphasis supplied)

It is important to note that Appellant Howard misquoted the statute at issue on page 2 of the Jurisdictional Statement which he filed with the Court.

Mr. Howard was originally licensed as a real estate broker in the State of Colorado on March 16, 1951. His license was renewed annually through 1957, but no renewal was issued for 1958 or any subsequent year. On December 19, 1972, pursuant to a new application for licensure as a real estate broker filed by Mr. Howard, Mr. Howard filed a Petition with the Real Estate Commission urging that a new real estate broker's license be issued to him without examination. The Real Estate Commission by Order dated January 29, 1974, qualified Mr. Howard as an applicant, considered Mr. Howard's Petition, but required Mr. Howard to take and successfully pass the broker's examination required of original applicants. With regard to the issue of the requiring of an examination, the Commission specifically found and incorporated in its Order:

> that there have been a great many developments, many quite complicated and complex, in real estate law and the practice of the real estate profession since applicant last practiced real estate over 16 years ago, in 1957, and that the Commission is charged by statute with properly ascertaining the competency of all applicants.

Mr. Howard sought review in the State District Court in and for the City and County of Denver under Colorado Rule of Civil Procedure 106, in the nature of mandamus. The Real Estate Commission filed a Motion to Dismiss in District Court arguing that Mr. Howard should be required to bring his action for judicial review of the Commission's decision under the provisions of the Colorado Administrative Procedure Act, C.R.S. 1973, 24-4-101, et seq, rather than under the extraordinary writ of mandamus. Colorado's Administrative Procedure Act is modeled after the Federal Administrative Procedure Act. The Denver District Court denied the Commission's Motion to Dismiss and allowed Mr. Howard to continue seeking judicial review via the mandamus route, apparently on the theory that Mr. Howard could elect which type of judicial review to seek. The Denver District Court ordered the Commission to issue Mr. Howard a license without examination, but this decision was reversed by the Colorado Court of Appeals which held that the Commission had properly exercised its discretion in requiring Mr. Howard to take the examination. The decision of the Colorado Court of Appeals is reported at 531 P.2d 98, and is attached to this motion as Appendix I. Mr. Howard filed a Petition for Writ of Certiorari in the Colorado Supreme Court, which was denied by the Supreme Court sitting en banc. (See Appellant's Appendix D to his Jurisdictional Statement).

Mr. Howard next commenced an action against the Commission in the United States District Court for the District of Colorado. Judge Matsch convened a three judge court to determine whether the subject statute was facially

invalid under the Fourteenth Amendment to the United States Constitution. This Court, in its decision, which Appellant Howard attached as Appendix A to his Jurisdictional Statement, held that the statute is not unconstitutional because of the open access to judicial review provided by Colorado statutory law. Mr. Howard is now appealing this decision to this Honorable Court.

REASONS FOR GRANTING THE MOTION TO DISMISS OR TO AFFIRM

1. THE COLORADO COURT OF APPEALS WAS ACTING WITHIN ITS PROPER AND AUTHORIZED JURISDICTION WHEN IT CONSIDERED APPELLANT HOWARD'S CASE.

Mr. Howard did not raise at any time before the Colorado Court of Appeals the issue that the subject statute was facially invalid or otherwise unconstitutional. Appellant Howard alleges on page 3 of his Jurisdictional Statement that the Colorado Court of Appeals "has no jurisdiction over cases in which the constitutionality of any statute is presented . . .". Mr. Howard is correct in this assertion in cases where a statute is being challenged as being unconstitutional on its face. However, Mr. Howard at no time raised the issue of the constitutionality of the subject statute before the Colorado Court of Appeals. In the Answer Brief which Mr. Howard filed with the Colorado Court of Appeals, he states on the first page as follows:

> 1. There are only two questions for this Honorable Court to determine, namely:
>
> (1) Did the trial judge, The Honorable Robert E. McLean abuse his discretion as a judicial officer?

> (2) Did the said trial judge exceed his jurisdiction?

The entire thrust of Mr. Howard's argument before the Court of Appeals was that the Commission abused its discretion and acted arbitrarily and capriciously in requiring him to take the examination. If Mr. Howard had chosen to raise the issue of the constitutionality of the subject statute, C.R.S. 1973, 13-4-110 (1) (b) provides an adequate remedy for transfer of the case from the Court of Appeals directly to the Colorado Supreme Court:

> A party in interest shall allege that a case is not properly within the jurisdiction of the court of appeals by motion filed with the court of appeals within twenty days after the date the record is filed with the clerk of the court of appeals, failing which any objection to jurisdiction by a party in interest shall be waived.

Mr. Howard never made any such motion in the Court of Appeals.

2. THE STATUTE AT ISSUE IS CONSTITUTIONALLY VALID BECAUSE OF THE OPEN ACCESS TO JUDICIAL REVIEW OF ADMINISTRATIVE AGENCY DECISIONS WHICH IS PROVIDED BY COLORADO LAW. SUCH JUDICIAL REVIEW PROVIDES MORE THAN ADEQUATE SAFEGUARDS AGAINST THE ABUSE OF DISCRETION AND FOR REDRESS OF WRONGS.

The Colorado Administrative Procedure Act, Colorado Revised Statutes 1973, Article 4, Title 24, generally provides numerous safeguards to preclude arbitrary exercises of power by State agencies subject to its provisions, such as the Real Estate Commission. A significant procedural safeguard which is built into this Act is a provision for

judicial review of the Commission's final action. Mr. Howard, as earlier stated, elected to seek judicial review under mandamus, rather than pursuant to the Administrative Procedure Act, over the Commission's objections. Rule 106 (a) (4) of the Colorado Rules of Civil Procedure which Mr. Howard elected to pursue provides for judicial review as follows:

> Where an inferior tribunal (whether court, board, commission or officer) exercising judicial or quasi-judicial functions, has exceeded its jurisdiction or abused its discretion, and there is no plain, speedy and adequate remedy.

The scope of federal review of administrative proceedings under the Federal Administrative Procedure Act is contained in 5 U.S.C. § 706 (2), enacted in 1966. The language of that section is nearly identical to the language contained in Colorado's Administrative Procedure Act. The Colorado Act provides the court may set aside agency action when the court finds:

> that—agency action is arbitrary or capricious, a denial of statutory right, contrary to constitutional right, power, privilege, or immunity, in excess of statutory jurisdiction, authority, purposes, or limitations, not in accord with the procedures or procedural limitations of this article, or otherwise required by law, an abuse or clearly unwarranted exercise of discretion, based upon findings of fact that are clearly erroneous on the whole record, unsupported by substantial evidence when the record is considered as a whole, or otherwise contrary to law . . .
>
> C.R.S. 1973, 24-4-106 (7)

Federal Courts reviewing administrative action, to the extent necessary, shall:

> " . . .
>
> (2) hold unlawful and set aside agency action, findings, and conclusions found to be—
>
> (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
>
> (B) contrary to constitutional right, power, privilege, or immunity;
>
> (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;
>
> (D) without observance of procedure required by law;
>
> (E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the records of an agency hearing provided by statute: . . ." 5 U.S.C. 706 (2).

Federal courts have consistently held that where an action of an adminisitrative agency rests upon a determination involving an exercise of judgment, that action may not be set aside simply because a reviewing court might have made a different determination were it empowered to do so. *Securities and Exchange Commission v. Chenery Corp.*, 318 U.S. 80 (1943).

The reviewing courts must consider whether a decision

of an administrative agency was based on consideration of relevant factors and whether there has been a clear error of judgment. Although this inquiry into the facts is to be searching and careful, the ultimate standard of review is a narrow one and the court is not empowered to substitute its judgment for that of the agency. *Bowman Transp., Inc. v. Arkansas-Best Freight System, Inc.*, 419 U.S. 281 (1974).

The decision of the Colorado Court of Appeals approved the specific findings of the Real Estate Commission. Clearly, the Real Estate Commission's action in denying a license without examination *to a person who had not been licensed in the profession for over 16 years* was a valid exercise of discretion and in the public interest. Such reasonable regulation of the real estate profession by the Commission is a matter of state interest and does not present a federal question. In any event, when employing the standards of review which federal courts have imposed in reviewing decisions of federal administrative agencies, it is clear that the Real Estate Commission's actions with regard to Mr. Howard in requiring the taking of a new examination were proper.

3. THE COLORADO LEGISLATURE PRESCRIBED ADEQUATE STANDARDS WHEN IT DELEGATED TO THE REAL ESTATE COMMISSION DISCRETIONARY AUTHORITY TO REQUIRE EXAMINATION OF FORMER LICENSEES WHO FAIL TO RENEW THEIR LICENSES.

The Colorado legislature has imposed a general standard to govern its delegation of authority to the Colorado Real Estate Commission concerning the licensing of real estate brokers and salesmen. That standard is that the Commission must ascertain that the applicant meets the statutory criteria of "competency to transact the business

of a real estate broker . . . in such a manner as to safeguard the interest of the public . . .". C.R.S. 1973, 12-61-102. Such standard is constitutionally sufficient.

The federal courts have been consistently liberal in recognizing the practical necessity of delegating powers to federal administrative agencies so long as some standards are set forth, even though they are broad as "reasonable" or "in the public interest". The two major antitrust and trade regulation federal statutes have withstood constitutional attacks despite the generality of their standards. The federal courts have sustained the constitutionality of Section 1 of the Sherman Act which declares illegal restraint of interstate commerce or foreign commerce of the United States construed to cover "unreasonable" restraints. *See* Oppenheim & Weston, Federal Antitrust Laws (3d ed. 1968) at 15.

Likewise, Section 5 of the Federal Trade Commission Act has been upheld as constitutional. The 1965 U. S. Supreme Court case of *Atlantic Refining Company v. Federal Trade Commission*, 381 U.S. 357, (1965), (decided together with *Goodyear Tire Co., v. F.T.C.*, 382 U.S. 873, (1965), upheld Section 5 of the Federal Trade Commission Act which declares "(u)nfair methods of competition in commerce, and unfair . . . acts or practices in commerce . . . unlawful." The Court noted that Congress intentionally left development of the rather broad term "unfair" to the Commission rather than attempting to define "the many and variable unfair practices which prevail in commerce . . . " S. Rep. No. 592, 63d Cong., 2d Sess., 13. As the conference report stated, unfair competition could best be prevented "through the action of an administrative body of practical men . . . who will be able to apply the rule enacted by Congress to particular business situations so as to eradicate evils with the least risk of interfering with legitimate business operations." H. R. Conf. Rep. No. 1142,

63d Cong., 2d Sess., 19. Where the Congress has provided that an administrative agency initially apply a broad statutory term to a particular situation, the court's function is limited to determining whether the Commission's decision "has 'warrant in the record' and a reasonable basis in law," citing *Labor Board v. Hearst Publications, Inc.*, 322 U.S. 111, 131 (1944). While the final word is left to the courts, courts necessarily "give great weight to the Commission's conclusion . . .", citing *Federal Trade Commission v. Cement Institute*, 333 U.S. 683, 720 (1948).

It has been held that it is for the Federal Trade Commission, not the courts, to determine in proceedings under the Federal Trade Commission Act the precise impact of a particular practice or trade, since the point where a method of competition becomes "unfair" often turns on the exigencies of a particular situation, trade practices, or practical requirements of the business in question. *Federal Trade Commission v. Motion Picture Advertising Service Co.*, 344 U.S. 392, (1953).

State courts in the past have been less liberal than federal courts in construing the sufficiency of statutory standards regarding delegation. More recently, however, the state courts have shown increasing awareness of the necessity of delegations of legislative power pursuant to broad standards. *See* 14 Stanford L. Rev. 372, 374, note 11, for citation of state court decisions and factors considered on adequacy of standards; Jaffe & Nathanson, *Administrative Law—Cases and Materials*, 87-93 (1968).

In *International Ry. Co. v. Public Service Commission*, 264 App. Div. 506, 36 N.Y.S 2d 125 (1942), *aff'd* 289 N.Y. 830, 47 N.E. 2d 435 (1943), the standard of "public interest" was held to be directly related and limited to the general purposes of the New York Police Service Law. The court said: "The legislature is not required to furnish de-

tails but only to provide a general guide for administrative action." The New York statute provided for judicial review of the Commission's determinations.

The fixing of general standards by the state legislature in the regulation of professions and occupations through the licensing power is often a practical necessity and should be deemed legally sufficient. On the surface, a standard may be seemingly vague, but in actual application it is not, when restricted by procedural due process such as notice and opportunity for a hearing, argument before and review by the subject commission and judicial review by the courts. In such instances, the agency's exercise of adjudicatory functions meet the constitutional requirements of due process and equal protection of the laws in cases arising either in state or federal courts.

In Colorado, the rule on delegation is well settled. The leading case on delegation is *Swisher v. Brown*, 157 Colo. 378, 388, 402 P.2d 621, 626 (1965), in which the test for determining whether legislative delegation of authority is proper was stated as follows:

> The Constitutional question raised is whether, in delegating such authority, the legislature completed its job of making a law by establishing a definite plan or framework for the law's operation. The legislature does not abdicate its function when it describes what job must be done, who must do it, and the scope of his authority. In our complex economy, that indeed is frequently the only way in which the legislative process can go forward.

The test enunciated in *Swisher, supra*, was reiterated in subsequent cases. *Lloyd A. Fry Roofing, Co. v. Department of Health Air Pollution Variance Board*, 499 P.2d 1176 (Colo. 1972); *People v. Giordano*, 173 Colo. 567, 481

P.2d 415 (1971); *Asphalt Paving Co. v. Board of County Commissioners*, 162 Colo. 254, 425 P.2d 289 (1967).

In *Swisher*, *supra*, the court further elaborated on the nature of the test to determine the constitutionality of legislative delegation of power. The court stated that the crux of the matter is whether the legislature has provided sufficient standards for the guidance of the administrative agency in the exercise of the authority conferred upon it by the legislature. In this regard, the court stated:

> It is not necessary that the legislature supply a specific formula for the guidance of the administrative agency in a field where flexibility and adaptation of the legislative policy to infinitely variable conditions constitutes the essence of the program. The modern tendency is to permit liberal grants of discretion to administrative agencies in order to facilitate the administration of laws dealing with involved economic and governmental conditions. In other words, the necessities of modern legislation dealing with complex economic and social problems have led to judicial approval of broad standards for administrative action, especially in regulatory and enactments under the police power.

Id at 627.

If the standards insisted upon by the federal courts were extremely rigid and specific, this would render sterile the administrative efficiency of state administrative agencies such as the Colorado Real Estate Commission.

CONCLUSION

WHEREFORE, Appellee Real Estate Commission of the State of Colorado submits that the questions upon which this cause depend are so unsubstantial as not to need further argument, and respectfully moves the Court to dismiss this appeal or, in the alternative, to affirm the Judgment entered in the cause by the three judge panel in Civil Action No. 75 M 297 of the United States District Court for the District of Colorado.

Respectfully submitted,

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APPENDIX I

COLORADO COURT OF APPEALS

NO. 74 - 193

H. GORDON HOWARD,

Plaintiff-Appellee,

v.

THE REAL ESTATE COMMISSION
OF THE STATE OF COLORADO,

Defendant-Appellant.

**APPEAL FROM THE DISTRICT COURT
OF THE CITY AND COUNTY OF DENVER**

Honorable Robert E. McLean, Judge

DIVISION II

JUDGMENT REVERSED AND CAUSE REMANDED
WITH DIRECTIONS

Silverstein, C. J., Enoch and Smith, JJ.
H. Gordon Howard, *pro se*

John P. Moore, Attorney General
John E. Bush, Deputy Attorney General
Irvin M. Kent, Assistant Attorney General
Bruce M. Douglas, Special Assistant Attorney General
Denver, Colorado

Attorneys for Defendant-Appellant

Opinion by CHIEF JUDGE SILVERSTEIN

Plaintiff (Howard) petitioned the Colorado Real Estate Commission (the Commission) to issue him a real estate broker's license without requiring him to take an examination. The Commission denied his petition, and Howard sought relief in the Denver District Court under C.R.C.P. 106(a)(2). The district court held that the Commission could not require the plaintiff to take the examination and ordered the Commission to issue the license. We reverse.

The record shows that Howard obtained a real estate broker's license in 1951, that the license was renewed anually through 1957, and that the license was revoked on December 3, 1957. The license was not renewed in 1958 or in any subsequent year. On October 16, 1972, Howard filed with the Commission a written application for a real estate broker's license. A hearing was held on the sole question of Howard's reputation for good and fair dealing. The hearing officer found that the Commission failed to show by competent evidence that the applicant lacked a good reputation for good and fair dealing. The hearing officer's Statement of Findings, Conclusions and Recommendation also stated: "[I]t is not the intent of such recommendation that the Applicant be exempted from the taking of such examinations as the Commission may require . . . ." The Commission adopted the hearing officer's findings and determined that Howard was qualified to take the examination.

Howard contended that the Commission could not require him to take the examination because at the hearing before the Commission the sole issue was his reputation for good and fair dealing, and he had never had a hearing on the issue of his being required to take the examination. The trial court held that, "[Howard] may not be arbitrarily required to re-take the test in question, without some showing of agency rules and regulations or some showing of

evidence that [Howard] is unqualified." The Court then ordered the Commission to issue the license forthwith.

The above ruling overlooks the fact that the method of determining the educational and intellectual qualifications of an applicant for a real estate broker's license under these circumstances is prescribed by statute, 1969 Perm. Supp., C.R.S. 1963, 117-1-8 (1) (d), which provides that: "All licensees who fail to renew their licenses before February 1st of each year succeeding the year of their previous licensing, shall be required to file a new application and *may* be required to submit to and pass the examination required by this article for original applicants." (emphasis supplied) The decision whether to require a previous licensee to take the broker's examination, therefore, rests within the sound discretion of the Commission.

As the Commission stated in its Order, "there have been a great many developments, many quite complicated and complex, in real estate law and the practice of the real estate profession since applicant last practiced real estate over 16 years ago, in 1957, and . . . the Commission is charged by statute with properly ascertaining the competency of all applicants." *See* 1969 Perm. Supp., C.R.S. 1963, 117-1-1 and 3. In *Brown v. Barnes*, 28 Colo. App. 593, 476 P.2d 295, we held:

> "Relief in the nature of mandamus to compel a public official to perform an act is narrowly interpreted. Such relief will be granted only in cases where the act is administrative in nature and a clear legal duty exists under a statute to perform this act. *People ex rel. Albright v. Board of Trustees of the Firemen's Pension Fund*, 103 Colo. 1, 82 P.2d 765. If the act sought to be compelled is one involving the exercise of discretion on the part of the official, or requiring a choice between alternative courses of action, then such

relief will be denied. *State ex rel. Holmes v. Peck*, 92 Colo. 224, 19 P.2d 217."

And in *Hall v. Denver*, 117 Colo. 508, 190 P.2d 122, the court held that mandamus cannot be used to control discretion, nor to compel a quasi-judicial tribunal to exercise its discretion in a particular way.

Since the Commission's Order involved an exercise of its discretion, the District Court erred in compelling the Commission to issue Howard a broker's license without examination.

The judgment is reversed, and the cause remanded with directions to dismiss the complaint.

JUDGE ENOCH and JUDGE SMITH concur.